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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PAUL W. PETERSON,
Petitioner-Plaintiff-Appellant,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, TRANSPORTATION-COMMUNICATION EMPLOYEES UNION, SYSTEM DIVISION NO. 34 and TRANSPORTATION-COMMUNICATIONS DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Respondents-Defendants-Appellees.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY OF PETITIONER, PAUL W. PETERSON, TO BRIEFS FOR RESPONDENTS, CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

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Both Union and Railroad in their respective Briefs ignore the correct rule governing the consideration of summary judgment. The "evidence introduced and all factual inferences from that evidence" should be viewed "in the light most favorable to the party opposing the motion..." (Peterson) "All reasonable doubts about the facts should be resolved in favor of the non-moving litigant...(Peterson) If reasonable minds might differ

on the inferences arising from...facts, then the court should deny summary judgment...." *Impossible Elec. Tech.* v. *Wackenhut Prot. Systems,* 669 F.2d 1026 (5th Cir. 1982), 1031.

Both Union and Railroad have misstated the facts and drawn erroneous inferences from the facts in the light most favorable to Union and Railroad rather than in the light most favorable to Peterson as clearly appears from a comparison of their briefs with Peterson's Statement of Facts (Pet. App. E, pgs. A40-A57).

Examples are as follows:

Peterson's first notification that Union would not appeal his case to the Board was by letter of January 28, 1966 from Union's General Chairman Hayes to Peterson (Pet. App. E, pg. A54). This followed the January 26, 1966 letter from Union President, G. E. Leighty, to Hayes (Pet. App. G, pgs. A77-A79). This was after, not before, the nine months limitation had been allowed to expire by Union. This was after Leighty's letter to Peterson of September 10, 1965, advising that, "The decision to process your case to the Third Division will be made by this office...." (Pet. App. E, pg. A53).

Union's and Railroad's summaries of the facts concerning Peterson's performance of his duties are abbreviated and slanted in favor of Union and Railroad rather than a full statement of facts taken in the light most favorable to Peterson as appears from Pet. App. E, pages A40-A43.

Union's and Railroad's summaries of Railroad's offer to reinstate Peterson to his first shift position and Peterson's rejection of the offer once again are slanted in favor of Union and Railroad. The correct statement of these facts in the light most favorable to Peterson is found at Pet. App. E, pages A43-A44, and from General Chairman Hayes' statement (Pet. 4).

Union's and Railroad's statement that Union informed Peterson his case lacked merit is to be contrasted with the evidence

that Union's General Chairman Hayes had told Peterson he thought he had a fifty-fifty case and that he had a "pretty good case". (Pet. App. E, A50). Moreover, the action and statement of Union's General Chairman Hayes in favor of Peterson *before* Union negligently allowed the nine months appeal limitation period to run, must be considered along with the Union's switch of position *after* the time limitation ran (see Pet. pages 4, 5, App. E, A50-A54).

Union relies heavily on the affidavit of Dean T. Echols (Union Br. App. A). An examination of this Affidavit reflects nothing other than a self-serving conclusion of Union's position that it made a fair appraisal of Peterson's case. The jury would have every reason to reject Echol's characterization. The jury could reasonably conclude that Echols' motive, like Leighty's, in claiming that the case had no merit was to avoid exposure of Union to a public determination by the Board that it had negligently, with no excuse whatever, permitted the time limitation to expire to the detriment of Peterson. In paragraph 8 of the affidavit, Echols states that Peterson's claim was assigned to him November 2, 1965. By this time, he had in his possession the entire file, which included the letter from Peterson to Leighty dated September 7, 1965 (Pet. App. E, pg. A52), and the reply of Leighty to Peterson dated September 10, 1965, Pet. App. E, A53). Notwithstanding his knowledge that Peterson had made clear he wanted an appeal taken, the time limitation expired November 16, 1965, with no advice to Peterson that Union would not appeal until after Echols had prepared the letter of January 26, 1966 for the signature of Leighty to Hayes (Union Br. App. B, pg. A9). Therefore, reading the letters relied on by Union, namely May 5, 1965 from Leighty to Hayes, and May 14, 1965 letter from Hayes to Peterson (Union Br. App. A, pg. A5, App. D, pg. A13), in context with the subsequent letters of September 10, 1965 from Leighty to Peterson in answer to Peterson's letter to Leighty of September 7, 1965 (Pet. App. E, pgs. A52, A53), establishes that the question of whether Union would take the appeal was still under considera-

tion by the Union as late as September 10, 1965, which was the last time Peterson was contacted until after the time limitation had expired.

Union's and Railroad's contention that Peterson was instructed to work during the pendency of his disqualification grievance is an inaccurate characterization stated most favorably from Union's and Railroad's position, whereas the evidence taken most favorably to Peterson on that point is to the contrary. Peterson was never given a direct order to work. He was denied the right to perform his first shift position and was assigned to no other position. The facts with regard to Railroad's dismissal of Peterson are stated in Pet. App. E, pages A46-A49.

Moreover, at the time of the dismissal hearing, Peterson's appeal of the wrongful disqualification action by Railroad was proceeding. He was the rightful owner of the first shift position until all of the appeal procedures had been concluded against him. Robert V. Burkhart, Union Local Chairman, a witness deposed by Union, testified on cross-examination by deposition taken October 11, 1977, pages 170-172, that:

Q: Now, let me ask you, in union parlance the words, "I own that job" has significance, doesn't it?

A: Yes, it does.

Q: And it means that through seniority he has acquired the right above anyone else to perform that job as long as he remains in it. Isn't that correct?

A: As long as he remains in it in a capacity that he can perform the job.

Q: Right.

A: In other words, as long as he's not sick and unable to perform it, he's entitled to remain in that job until he is properly removed from the position.

Q: Through the exhausting of all procedures, right?

A: Yes.

Q: And so that's what labor means or the union means when they say the man owns a job?

A: That's right.

Q: And in the event that somewhere along the line in the appeal route in the procedure it was determined that the disqualification was wrongful, you know, do you not, that he would be considered in union parlance the owner of that job?

A: As far as I'm concerned, he was owner of the job until he was actually fired.

Q: All right. And in the event that the railroad had been reversed, say, at the first appeal level—you know what I mean?

A: Uh-huh.

Q: And they would have said you wrongfully disqualified him, he would still be the owner of the job; correct?

A: Yes.

Q: Well, then in the event that the appeal had been carried forward and the National Railroad Adjustment Board had reversed management and said the disqualification was wrongful, Paul Peterson would be the owner of the job, wouldn't he?

A: Yes.

Nothing in the Collective Bargaining Agreement required Peterson to work any other shift than first shift at Wansford Yard during the pendency of the appeals. This was not a case of

discipline for an indiscretion. This was a situation wherein Peterson had been banned by Railroad from performing his rightfully owned position under the rules of seniority. Railroad's action in banning Peterson from his job conferred no right on Railroad to require him to perform any other position until the appeal procedures were completed. Railroad points to no provision in the Collective Bargaining Agreement requiring Peterson to either bid in another position or sign up on the extra board during the pendency of appeal from Railroad's wrongful disqualification.

Union and Railroad both come to the unwarranted conclusion that the Union based its decision not to handle the appeal to the Board upon its review of the evidence and conclusion that Peterson's grievance lacked merit.

This conclusion neglects a proper consideration of the inferences favorable to Peterson which arise from the facts as analyzed in Petition for Writ of Certiorari at pages 10-20. The question of whether there was a bad faith appraisal by Union of Peterson's case is for the jury to determine, not for the Railroad, Union, District Court or Circuit Court of Appeals to decide.

Union and Railroad inject the spurious issue that the Board found the Railroad had not violated the Collective Bargaining Agreement. This has nothing to do with the key issue raised by Peterson.

Throughout their Briefs, Union and Railroad continued to avoid meeting the issue involving summary judgment procedure now before this Court. Union and Railroad avoid the real issue of what constitutes a question of fact for the jury. The crux of Union's and Railroad's misconception of the issues involved is found at page 12 of Railroad's Brief wherein it erroneously states, "Once decided, the findings and order of the Board were final and binding on the parties and not subject to an independent determination by a jury."

This totally ignores the fact that if the jury finds in the same lawsuit that the Union breached its duty of fair representation, tainting the arbitral process, it may then move onto the next question, namely, whether the Railroad wrongfully disqualified and discharged Peterson. Nothing in the cases cited by Union or Railroad preclude the same jury from deciding first the issue of fair representation, and second, the issue of whether Railroad was guilty of wrongful acts.

It is only common sense to permit these two issues to be tried at the same time. The facts relevant to Peterson's performance and Railroad's conduct must be considered by the jury on Peterson's Complaint against both the Union and the Railroad. The same facts bearing on Union's obligation to make a good faith appraisal of Peterson's case likewise bear on whether Railroad wrongfully disqualified and discharged Peterson.

Union is in error at pages 10 and 11 of its Brief wherein it states that Peterson did not raise the right to trial by jury in the District Court. A jury demand was filed as to the common law counts against both defendants in the District Court at the first opportunity with leave of Court April 22, 1969. After the District Court entered summary judgment in favor of both defendants, Peterson filed his Motion for New Trial contending that the judgment so rendered deprived him of his right to trial by jury against both defendants, which Motion the District Court denied on May 12, 1982. At pages 15 and 16 of the Motion for New Trial, it is stated:

> "The evidence and inferences weighed most strongly in favor of plaintiff present a fact question for a jury and not for determination by summary judgment.... The facts relied upon by plaintiff, taken in the light most favorable to the plaintiff, entitle him to a jury trial rather than a determination against him on summary judgment motions as to whether the arbitral process has been tainted...."

In Peterson's Brief filed in the Circuit Court of Appeals, the entire Brief raised the question of trial by jury. The conclusion stated:

> "Thus far, Peterson has been erroneously deprived of a trial by jury to which he is entitled under the facts and law of this case. He prays that this Court grant him the right by reversing the summary judgments entered by the trial court and remanding the case with direction that defendants be required to file their answers and the case proceed to trial before a jury against both Railroad and Union."

The cases cited by Union are not in point. A summary judgment does violate the 7th Amendment when it is rendered in a case "where a choice of inferences is possible from summary judgment materials." In such instance, "the inference must be drawn that favors the party resisting summary judgment." *Baldini* v. *Local Union No. 1095, Intern. U., etc.*, 581 F.2d 145 (7th Cir. 1978), page 151.

CONCLUSION

Union and Railroad state nothing in their Briefs which justify a denial of the Petition for Writ of Certiorari as prayed in Peterson's Petition. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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